STATE OF MICHIGAN

COURT OF APPEALS

THOMAS R. LOWE,

Plaintiff-Appellant,

v

CITY OF PORTAGE,

Defendant-Appellee.

UNPUBLISHED
August 26, 2003

No. 238133
Kalamazoo Circuit Court
LC No. 00-000165-CZ

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

In this discrimination action, plaintiff appeals as of right from the trial court's November 29, 2001 order that granted defendant's motion for directed verdict. We affirm.

Since 1975, plaintiff has worked for defendant. In 1981, plaintiff was diagnosed with diabetes which was controlled through a combination of diet, exercise, and oral medication. In 1993, plaintiff's position required him to obtain a commercial driver's license (CDL). Because of his diabetes, plaintiff was required to obtain, and did obtain, a medical waiver from the Motor Carrier Division of the State Police. In 1998, plaintiff became insulin dependent. Learning of the change in his medical condition, defendant instructed plaintiff to obtain a physical from the Department of Transportation. The examining physician told plaintiff that he needed to obtain another medical waiver in order to continue performing his job operating heavy equipment. The waiver had to be signed by defendant before it was sent to the state for evaluation. Defendant refused to sign the waiver because it believed that plaintiff posed a high safety risk to its other employees and to the residents of Portage. As a result, defendant assigned plaintiff to the lower-paid position of general laborer. This suit ensued. Plaintiff alleged that defendant discriminated against him based upon his diabetic condition, contrary to the Michigan Persons with Disabilities Civil Rights Act[1] (PWDCRA), MCL 37.1101 *et seq.*, and unlawfully refused to accommodate him by not signing his application for a medical waiver.

This Court reviews de novo a trial court's decision on a motion for a directed verdict. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 779 (2002). We

[1] Formerly known as the Michigan Handicappers' Civil Rights Act, amended by 1998 PA 20.

must consider all the evidence presented up to the time of the motion to determine whether a question of fact existed. In doing so, we view the evidence in the light most favorable to the nonmoving party, grant him every reasonable inference, and resolve any conflicts in his favor. *Id.* at 701-702. A court may grant a motion for a directed verdict if the evidence did not establish a prima facie case and reasonable persons would agree that there was an essential failure of proof. *Id.* at 702.

Plaintiff contends that defendant discriminated against him when it demoted him to the position of general laborer. Defendant asserts that plaintiff was no longer qualified for the position of equipment operator II because he could not obtain a valid CDL that was required for the position, thus necessitating removing plaintiff from that position. The PWDCRA prohibits discrimination, including in hiring, firing, and advancement, based on an individual's disabled status. MCL 37.1202; *Petzold v Borman's, Inc*, 241 Mich App 707, 713; 617 NW2d 394 (2000). A prima facie case of discrimination under the PWDCRA is established where (1) the plaintiff is "disabled" as defined in the statute, (2) the disability is unrelated to the plaintiff's ability to perform the duties of a particular job or position or is unrelated to the plaintiff's qualifications for employment or promotion, and (3) the plaintiff has been discriminated against in one of the ways set forth in the statute. MCL 37.1202(1); *Petzold, supra* at 714.

The Motor Carrier Safety Act, MCL 480.11 *et seq*., requires all drivers of commercial vehicles to obtain a CDL. MCL 480.12d(1). To be qualified to obtain a CDL, an applicant must meet all of the requirements of 49 CFR part 391, the federal motor carrier safety regulations. MCL 480.12d(2). One of these federal regulations provides that a person is not qualified to drive a commercial motor vehicle if that person has a "diagnosis of diabetes mellitus currently requiring insulin for control." 49 CFR 391.41(b)(3). Under the PWDCRA, "unrelated to the individual's ability" means, "with or without accommodation, an individual's disability does not prevent the individual from . . . performing the duties of a particular job or position." MCL 37.1103(l)(i). Therefore, in this case, given the Motor Carrier Safety Act's requirements for obtaining a CDL, plaintiff's diabetes prevented him from performing the duties of a heavy equipment operator because plaintiff was considered not qualified to drive commercial vehicles, a required qualification for the position.[2] In the context of the PWDCRA, this meant that plaintiff's diabetes was related to his ability to perform the job. Consequently, plaintiff was not "disabled" within the meaning of the PWDCRA. *Shirilla v Detroit*, 208 Mich App 434, 443; 528 NW2d 763 (1995).

This conclusion is supported by this Court's decision in *Shirilla, supra*. In that case, the defendant refused to hire the plaintiff as a bus driver because he was an insulin-dependent diabetic, and, therefore, by law pursuant to MCL 474.131, was not qualified to drive a commercial vehicle. *Id*. at 436. Section 31 of the Motor Bus Transportation Act (MBTA), MCL

---

[2] Plaintiff argues that this per se rule is unreasonable given the technological advancements in the field of diabetic care management. While this may be true, we must interpret the law as written and leave to the province of the Legislature to amend the Motor Carrier Safety Act's requirements for obtaining a CDL. *Shirilla v Detroit*, 208 Mich App 434, 443; 528 NW2d 763 (1995); compare to *Kapche v San Antonio*, 176 F3d 840 (CA 5, 1999).

474.131, also incorporated 49 CFR 391.41(b)(3) of the federal motor carrier safety regulations, subject to the waiver provision in MCL 480.12k. *Id*. at 437-438. The *Shirilla* Court held that the handicappers' act was impliedly repealed in part by § 31 of the MBTA because it was enacted after the handicappers' act. *Id*. at 440. "Where a clear conflict exists, the later enactment controls." *Id*. Here, the same type of conflict exists between § 2d of the Motor Carrier Safety Act and the PWDCRA. Defendant cannot discriminate against plaintiff solely on the basis of his diabetes, nor can it allow plaintiff to drive commercial vehicles without a valid CDL. Because MCL 480.12d was enacted after the PWDCRA, it controls.[3]

Plaintiff counters that "with accommodation" he could obtain a CDL and thus be able to perform the duties of an equipment operator II. Pursuant to MCL 480.12k(1), a person who is not physically qualified to drive under 49 CFR 391.41 may obtain a medical waiver from the motor carrier division of the state police. The application for waiver must be submitted jointly by the person seeking the waiver and his employer, both of whom must sign the application. MCL 480.12k(2); MCL 480.12k(5). Plaintiff asserts that defendant's refusal to sign the waiver constituted its refusal to accommodate plaintiff. We disagree.

As our Supreme Court noted in *Rourk v Oakwood Hosp Corp*, 458 Mich 25, 32-33; 580 NW2d 397 (1998), the PWDCRA specifically identifies the following types of accommodation: "(1) purchasing equipment and devices, (2) reasonable routine maintenance or repair of such equipment and devices, (3) hiring readers and interpreters, and (4) restructuring jobs and altering schedules for minor and infrequent duties." The Court in *Rourk* recognized that these accommodations were not an "exhaustive list" of accommodations, but did provide guidance as to the types of accommodations the Legislature contemplated. *Id*. at 33. Notably, the accommodations listed in MCL 37.1210 generally pertain to physical changes in the workplace, either to the building itself to allow the employee access or to the employee's work station to permit actual performance of the job duties. *Id*., citing *Rancour v Detroit Edison Co*, 150 Mich App 276, 287; 388 NW2d 336 (1986). Accordingly, this Court has held that an employer's duty to accommodate does not extend to job transfers or vocational rehabilitation. *Marsh v Dep't of Civil Service*, 173 Mich App 72, 80; 433 NW2d 820 (1988).

Similarly, we believe that requiring defendant to assist plaintiff in obtaining a waiver is not within the scope of accommodation intended by the Legislature. To do so would strip the employer of any discretion regarding business decisions on safety issues. Again, we turn to this Court's reasoning in *Shirilla*, *supra*. In regards to the waiver provision, the Court stated,

> By providing a means of exempting certain individuals from the dictates of 49 CFR 391.41, the waiver procedure suggests that 49 CFR 391.41 is otherwise unconditional. . . . In addition, the highly procedural nature of the waiver

---

[3] The PWDCRA was originally enacted in 1976. 1976 PA 220. In 1995, MCL 480.12d was substantively amended and incorporated the requirements of 49 CFR part 391. 1995 PA 265. The Legislature is presumed to be aware of existing laws and is presumed to have considered the effect of new laws on all existing laws. *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993).

> exception indicates that it should not be read as a substantive qualification of § 31 of the MBTA or 49 CFR 391.41 or as an incorporation of the principles of the handicappers' act into these provisions. Instead, an applicant claiming fitness for a position despite a disability listed under 49 CFR 391.41 must follow the detailed procedures outlined in the waiver provision. [*Id*. at 442; footnote omitted.]

The *Shirilla* Court further stated that "the decision whether to provide the required employer signature on plaintiff's waiver application" was "left to defendant's discretion." *Id*. at 442-443. Hence, the Court determined, and we agree, that the waiver provision did not affect the nondiscretionary nature of the ban on the hiring of insulin-dependent individuals, as provided in § 31 of the MBTA. *Id*. at 441.

On the facts of the instant case, we find that defendant had no duty under the PWDCRA to accommodate plaintiff by signing and jointly submitting his application for waiver pursuant to MCL 480.12k. Because section 2d of the Motor Carrier Safety Act, by incorporating the federal provisions in 49 CFR 391.41(b)(3), prohibited plaintiff from obtaining a CDL, plaintiff could not establish that his diabetes was unrelated to his ability to perform the duties of an equipment operator II in defendant's employ. We note that this is not a factual determination. Rather, as this Court stated in *Shirilla, supra* at 443,

> Our decision does not reach the issue whether plaintiff's diabetic condition actually was related to his ability to work as a bus driver and constituted sufficient grounds for the denial of his application. That decision has already been made by the Legislature with the adoption of the federal motor carrier safety regulations. Our decision merely gives effect to that adoption. Any changes to those safety regulations must be made by the Legislature. [Footnote omitted.]

Accordingly, we hold that the trial court did not err in granting defendant's motion for a directed verdict because plaintiff failed to establish a prima facie case of discrimination under the PWDCRA.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael R. Smolenski
/s/ Christopher M. Murray